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Plaintiff Standing In *Florida Ex Rel. Bondi* And The Challenges To The Patient Protection And Affordable Care Act

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Plaintiff Standing in *Florida ex rel. Bondi* and the Challenges to the Patient Protection and Affordable Care Act

GAYLAND O. HETHCOAT II*

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I. INTRODUCTION

The battle for health-care reform was hardly over when President Barack Obama signed into law Congress’s sweeping reform legislation, the Patient Protection and Affordable Care Act (PPACA).¹ Minutes after the President’s signing on March 23, 2010, the legal battle over the law indeed just began when a coalition of thirteen States, with then-Florida Attorney General Bill McCollum at the lead, filed suit in federal court in northern Florida to challenge the Act’s constitutionality.² That same day,

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. See Complaint, *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91), 2010 WL 1038209.

Virginia Attorney General Kenneth Cuccinelli sued separately in that state, with Virginia the sole plaintiff, on similar grounds as the States in Florida;³ and elsewhere private citizens and organizations initiated yet other suits condemning the PPACA as an unconstitutional grab of power by the federal government.⁴ Meanwhile, legal momentum against the Act has continued to build as similar lawsuits have emerged across the country, and district courts have rendered conflicting opinions on the procedural and substantive dimensions of the challenges.⁵

Although the forum for debate is now the courts, the political overtones of these challenges are “self-evident.”⁶ This is particularly so in the Florida case, where all but one of the twenty-six state governors and attorneys general who are now plaintiffs are Republican. “The lawsuit could have been filed anywhere,”⁷ but media reports speculated that McCollum and the other state officials opted for Florida to ensure that appellate review rested with the U.S. Court of Appeals for the Eleventh Circuit, a “generally conservative bench,”⁸ which has garnered Supreme Court review in recent years for invalidating federal law.⁹ As a means to

3. See Complaint for Declaratory & Injunctive Relief, *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10-cv-00188-HEH), 2010 WL 1038397. See generally Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37 (2010).

4. See Complaint, *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156-GCS-RSW), 2010 WL 4784409; Complaint for Declaratory, Preliminary & Permanent Injunctive Relief, *Liberty Univ., Inc. v. Geithner*, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) (No. 6:10-cv-00015-nkm).

5. See Amy Goldstein, *Status of Legal Challenges to Obama Health Care Overhaul*, WASH. POST, Dec. 13, 2010, <http://www.washingtonpost.com/wp-srv/special/health-care-overhaul-lawsuits/> (summarizing twenty-four lawsuits challenging the constitutionality of the PPACA).

6. Timothy S. Jost, *Pro and Con: State Lawsuits Won't Succeed in Overturning the Individual Mandate*, 29 HEALTH AFFAIRS 1225, 1227 (2010), available at <http://content.healthaffairs.org/content/29/6/1225.full.pdf+html>. Although Republican legislators have been eager since the commencement of the 112th Congress to repeal the PPACA, their efforts are likely to be fruitless as long as Democrats maintain a majority in the Senate and the presidency. See, e.g., Repealing the Job-Killing Health Care Law Act, S. 192, 112th Cong. (2011); Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011). Thus, the fate of the Act—at least in the short term—seems to lie in the judiciary.

7. Kevin Sack, *Florida Suit Poses a Challenge to Health Care Law*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/11/health/policy/11lawsuit.html?pagewanted=1&emc=eta>; see also, e.g., Tom McLaughlin, *Why Challenge Health Care Reform in Pensacola?*, NORTHWEST FLA. DAILY NEWS, Mar. 24, 2010, <http://www.nwfdailynews.com/news/pensacola-27292-mccollum-health.html>.

8. Sack, *supra* note 7.

9. See *United States v. Matthews*, 143 F. App'x 298 (11th Cir.) (mem.) (affirming dismissal of criminal charges under the Child Pornography Prevention Act of 1996 as an unconstitutional exercise of the Commerce Clause), *vacated*, 546 U.S. 1073 (2005) (mem.) (vacating and remanding in light of *Gonzales v. Raich*, 545 U.S. 1 (2005)); *United States v. Smith*, 402 F.3d 1303 (11th Cir.) (holding that the Child Pornography Prevention Act of 1996 exceeded the Commerce Clause in an as-applied challenge), *vacated*, 545 U.S. 1125 (2005) (mem.) (vacating and remanding in light of *Raich*); *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004).

this alleged end, McCollum chose not to file suit in Tallahassee, the location of the Florida attorney general's office. Instead, he filed it 200 miles away in Pensacola, "bypassing a Tallahassee judge who was named by President Bill Clinton and ensuring that the judge would be a Republican appointee."¹⁰

Since then, the courts have become fully enmeshed in determining the legal validity of the PPACA. The legislation aims broadly to curb practices of the health-insurance industry that restrict access to health-care services and that shift costs to consumers, and aims also to extend public and private health-insurance coverage to millions of Americans. The Act's most controversial provision—the challenge to which strikes "[a]t the heart of the Florida lawsuit"¹¹—will require most U.S. citizens, beginning in 2014, to maintain "minimum essential coverage" under a health-insurance plan or else incur a monetary "penalty."¹² In defending this provision in court, the federal government has relied principally on the Commerce Clause¹³ and the General Welfare Clause¹⁴ in Article I of the Constitution. As of this writing, three district courts upheld the provision under the Commerce Clause, while two district courts—including the Florida district court—rejected it under both clauses.¹⁵

Undoubtedly, the Florida district court's decision—or any district-level decision—"will certainly not be the final word"¹⁶ on the PPACA's

(holding that the Child Pornography Prevention Act of 1996 exceeded the Commerce Clause in an as-applied challenge), *vacated*, 546 U.S. 801 (2005) (mem.) (vacating and remanding in light of *Raich*); cf. Sanford L. Bohrer & Matthew S. Bohrer, *Congressional Power to Criminalize "Local" Conduct: No Limit in Sight*, 64 U. MIAMI L. REV. 1221 (2010) (reviewing recent Eleventh Circuit decisions that upheld, against Commerce Clause attack, federal statutes governing the knowing possession of a firearm, the local possession of stolen property, and sex-offender registration).

10. Sack, *supra* note 7.

11. Jost, *supra* note 6, at 1227.

12. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1501, 124 Stat. 192, 242–50 (2010).

13. U.S. CONST. art. I, § 8, cl. 3.

14. U.S. CONST. art. I, § 8, cl. 1.

15. Compare *Mead v. Holder*, No. 10-950 (GK), 2011 WL 611139 (D.D.C. Feb. 22, 2011) (upholding the provision under the Commerce Clause), *appeal filed sub nom. Seven-Sky v. Holder*, No. 10-5047 (D.C. Cir. Mar. 1, 2011), and *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va.) (same), *appeal filed*, No. 10-2347 (4th Cir. Dec. 3, 2010), and *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich.) (same), *appeal filed*, No. 10-2388 (6th Cir. Oct. 25, 2010), with *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (invalidating the provision as beyond the scope of the Commerce Clause after having previously held on motion to dismiss that the General Welfare Clause was inapplicable), *appeal filed*, No. 11-11021 (11th Cir. Mar. 9, 2011), and *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (invalidating the provision as beyond the scope of the Commerce Clause and holding that the General Welfare Clause was inapplicable), *appeal filed*, Nos. 11-1057 & 11-1058 (4th Cir. Jan. 20, 2011).

16. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 609 (E.D. Va. 2010).

constitutional legitimacy. As one district court explained, “the controversy ignited by the passage of the legislation . . . will eventually require a decision by the Supreme Court after the . . . litigation works its way through the various circuit courts.”¹⁷ Commentators have opined that the Eleventh Circuit is uniquely poised to adjudicate the case that might very well attract Supreme Court review: *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*.¹⁸ Perhaps most significantly among its features lacking in the other cases, *Bondi* includes more than half the States in the United States as plaintiffs (along with two private citizens and a trade association), giving it “an institutional heft or prestige”¹⁹ Moreover, in addition to the dispute over the minimum-coverage provision, *Bondi* also presents a contention that the PPACA’s amendments to Medicaid unconstitutionally “coerce and commandeer” the States to serve the federal government. With two issues for review, the Supreme Court could rule on one ground for the plaintiffs and take “some degree of political cover” by ruling for the federal government on the other.²⁰

But the course of the litigation is not foreordained. This casenote cautions the Eleventh Circuit to take into account the role that *Bondi* might play in shaping the future of the PPACA and to critically review the fundamental procedural issues in the case before reaching the substantive constitutional ones. With respect to the minimum-coverage provision in particular, this note questions the *Bondi* court’s Article III standing analysis with regard to the two citizen plaintiffs in the case—whom the court initially recognized as having standing to challenge the provision—and proposes a more appropriate analytical framework in light of other PPACA case law. This note further scrutinizes the *Bondi* court’s conclusion that the State plaintiffs also have standing to chal-

17. U.S. Citizens Ass’n v. Sebelius, No. 5:10 CV 1065, 2010 WL 4947043, at *2 (N.D. Ohio Nov. 22, 2010); cf. Petition for a Writ of Certiorari Before Judgment, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 10-1014 (U.S. Feb. 8, 2011), 2011 WL 465746.

18. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Note that the stylization of the case changed from the dismissal stage (*Florida ex rel. McCollum*) to the summary-judgment stage (*Florida ex rel. Bondi*) to reflect Florida’s new Attorney General, Pam Bondi, taking over the case. This note thus refers to the case as “*Florida ex rel. Bondi*” or “*Bondi*” when generally describing the case. For an overview of Bondi’s views on the issues in the Florida lawsuit and the role that it played in her election, see Pam Bondi, Op-Ed, *The States Versus ObamaCare*, WALL ST. J., Jan. 5, 2011, <http://online.wsj.com/article/SB10001424052748703384504576055652391100520.html>.

19. Brad Joondeph, *And the Focus Shifts to Pensacola . . .*, ACA LITIG. BLOG (Dec. 15, 2010, 4:50 PM), <http://acalitigationblog.blogspot.com/2010/12/and-focus-shifts-to-pensacola.html>.

20. *Id.* General agreement has formed in the coverage of *Bondi* that the plaintiffs’ contention regarding the minimum-coverage provision is stronger and more likely to produce a favorable outcome than their Medicaid argument. See, e.g., *Medicaid Argument Seen as Weak Compared to Minimum Coverage Challenge*, 19 HEALTH L. REP. (BNA) 1781 (Dec. 23, 2010).

lenge the provision and posits that no current principle of standing supports this conclusion.

Concern that *Bondi*—a case that is “laden with public policy implications and [that] has a distinctive political undercurrent”²¹—is an improper vehicle to resolve the novel constitutional questions regarding the minimum-coverage provision is the motivating force behind this note’s narrow procedural lens. Simply put, the so-called “individual mandate” to purchase health insurance should constitutionally live or die within the confines of a genuine “individual” legal challenge. Although *Bondi* does include individual citizen plaintiffs, their role in the suit is perfunctory; the States are the partisan drivers. None of this, of course, is to say that the minimum-coverage provision is unconstitutional (insofar as an individual has standing to challenge it), which commentators already have vigorously debated.²²

This note is organized as follows: Part II contextualizes the issue of standing in *Bondi* with a cursory sketch of the PPACA’s minimum-coverage provision and the substantive constitutional conflict that it has engendered. Part III discusses the *Bondi* opinions on motion to dismiss and on motions for summary judgment. Part IV contrasts *Bondi*’s citizen–plaintiff standing analysis with the standing jurisprudence that has burgeoned from other PPACA case law, focusing on the courts’ distinction between present injury-in-fact and future injury-in-fact. Part IV further submits that the State plaintiffs lack standing to contest the minimum-coverage provision. This part recognizes, however, that principles of state standing vis-à-vis the federal government are perhaps debatable in light of the Supreme Court in *Massachusetts v. Environmental Protection Agency*²³ holding that a state “is entitled to special solicitude in [its] standing analysis.”²⁴ Part V concludes.

II. THE MINIMUM-COVERAGE PROVISION: THE FOCAL POINT OF CONTROVERSY

A. *The Statutory Scheme*

“At nearly 2,700 pages, the [Patient Protection and Affordable Care] Act is very lengthy and includes many provisions”²⁵ Despite this breadth, judicial review, scholarship, and media coverage have

21. *Cuccinelli*, 702 F. Supp. 2d at 601.

22. See, e.g., David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, Debate, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>.

23. 549 U.S. 497 (2007).

24. *Id.* at 520 (footnote omitted).

25. *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1128 (N.D. Fla. 2010).

focused largely on the “minimum essential coverage” provision, known popularly as the “individual mandate.”²⁶ Congress enacted this measure on the premise of findings about the state of the national health-care market and the role that the minimum-coverage provision would play in relation to the PPACA’s various reforms. Specifically, Congress found that the continual growth of spending on health insurance and health-care services—comprising 17.6 percent of the national economy in 2009—created an environment susceptible to congressional regulation of the health-insurance market.²⁷ Congressional regulation was warranted, moreover, in part because Congress found that medical expenses cause half of all personal bankruptcies,²⁸ and insurance companies’ administrative costs for plans in the current individual and small-group markets had grown to consume twenty-six to thirty percent of premiums.²⁹

In Congress’s view, the minimum-coverage provision was integral to its larger policy goals of greater access to the health-insurance marketplace and lower prices of insurance plans within that marketplace. Congress reasoned that by working in concert with other provisions that liberalize Medicaid eligibility and subsidize the purchase of private insurance through regulated health-insurance exchanges, the provision would substantially increase the number of insured.³⁰ Indeed, the provision would achieve “near-universal coverage.”³¹

Furthermore, Congress considered the minimum-coverage provision “essential” to effectuating other reforms that would promote access and lower prices.³² In particular, the provision would empower other parts of the PPACA that prohibit insurers from denying or increasing the price of coverage based on an individual’s preexisting health conditions; rescinding or declining to renew coverage because of an individual’s health status; and imposing annual or lifetime caps on the coverage

26. See generally *The Constitutionality of National Health Reform*, COLUM. L. SCH., http://www.law.columbia.edu/center_program/ag/policy/health/resources/reformarticles (last visited Jan. 9, 2011) (collecting news sources, policy papers, blog entries, and other resources on the constitutionality of the PPACA). This casenote generally refrains from using “individual mandate.” Politically charged, this term suggests that everyone must obtain health insurance under the PPACA. When one accounts, however, for the groups of persons to whom the provision does not apply, one realizes that “individual mandate” is overbroad. See Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. ENG. J. MED., Jan. 13, 2010, <http://healthpolicyandreform.nejm.org/?p=2764&query=home> (describing “individual mandate” as “misleading”).

27. 42 U.S.C.A. § 18091(a)(2)(B) (West 2010).

28. *Id.* § 18091(a)(2)(G).

29. *Id.* § 18091(a)(2)(J).

30. See, e.g., *id.* § 18051 (expanding eligibility for public health-insurance coverage).

31. *Id.* § 18091(a)(2)(D).

32. *Id.* § 18091(a)(2)(I).

available to a policyholder.³³ Without the minimum-coverage provision, but with the other regulations in place, Congress concluded that “many individuals would wait to purchase health insurance until they needed care.”³⁴ This phenomenon is called adverse selection.³⁵ No longer armed with the traditional defenses to protect its bottom line, the insurance industry would raise premiums across the board to pass on the costs of treating those who suddenly would need health care. The resulting market pressures from having to serve needy policyholders while losing less needy ones who could not afford or would not want to pay higher premiums could “drive the health insurance industry into extinction.”³⁶

Mechanically, the minimum-coverage provision will operate by imposing a monthly obligation on an “applicable individual” to maintain “minimum essential coverage” for that individual and any dependents beginning in 2014.³⁷ “Minimum essential coverage” encompasses various public and private health-insurance schemes, including Medicaid and employer-sponsored plans that satisfy stipulated eligibility requirements.³⁸ Those who are subject to the provision and fail to obtain adequate health insurance will face a monetary “penalty,” which the Internal Revenue Service will include with a taxpayer’s return.³⁹ Mitigating the harshness of this penalty, the statute enumerates various exemptions, which preclude imposition of the penalty on, among others, individuals who cannot afford coverage and those who have suffered a “hardship” in their capability to acquire sufficient coverage.⁴⁰ The statute also disallows criminally punishing a taxpayer, filing of notice of lien with respect to a taxpayer’s property, and levying on any such property for not timely paying the penalty.⁴¹

B. *The Constitutional Debate*

The constitutional debate surrounding the minimum-coverage provision has been broad in scope. On one side are arguments over whether

33. See, e.g., *id.* § 300gg-11 (prohibiting lifetime or annual limits on health-insurance coverage).

34. *Id.* § 18091(a)(2)(I).

35. See *id.*

36. Florida *ex rel.* McCollum v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120, 1129 (N.D. Fla. 2010).

37. 26 U.S.C.A. § 5000A(a) (West 2010). The provision does not regard certain individuals, such as individuals with valid religious objections to not being subject to its obligations and individuals unlawfully present in the United States, as “applicable individual[s].” *Id.* § 5000A(d)(1)–(4).

38. *Id.* § 5000A(f)(1)–(3).

39. *Id.* § 5000A(b)(1)–(2).

40. *Id.* § 5000A(e).

41. *Id.* § 5000A(g)(2).

the Constitution limits this exercise of congressional power. Affirmative allegations have ranged from the contention that the provision forces one to associate with “those who ‘support or engage in abortion’ and with insurers who fund abortions” in violation of one’s First Amendment freedom;⁴² to the argument that the provision confers the federal government with “absolute sovereignty” and “censorial power” over the citizenry, thereby infringing the constitutional guarantee of a republican government.⁴³ On the other side of the debate are arguments over whether the Constitution empowers Congress with the right to enact the minimum-coverage provision. To the extent that this is a negativist–positivist distinction, the courts have engaged primarily in positivist inquiry, focusing mainly on whether the minimum-coverage provision is defensible as a regulation of interstate commerce under the Commerce Clause or a tax-raising mechanism under the General Welfare Clause.

The decisions so far have been split. The courts that upheld the provision did so under the Commerce Clause, relying on two bases. First, they accepted that “the economic decisions that the Act regulates as to how to pay for health care services have direct and substantial impact on the interstate health care market.”⁴⁴ Notably, these courts rejected the argument that the decision not to purchase health insurance is “inactivity” and thus is beyond the limits of the Commerce Clause. Because every individual will need medical care at some point in his or her life, they reasoned, this decision amounts to an affirmative choice to cover one’s medical costs through a compensation scheme other than health insurance (for example, charitable hospital care).⁴⁵ Moreover, “the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies.”⁴⁶ Second, these courts agreed that “the minimum coverage provision is essential to the Act’s larger regulation of the interstate business of health insurance.”⁴⁷ Looking to Congress’s statutory findings, these courts pointed out the harms of adverse selection that would

42. *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at *26 (W.D. Va. Nov. 30, 2010) (citation omitted).

43. *Id.* at *29 (internal quotation marks omitted); see U.S. CONST. art. IV, § 4.

44. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010); *Mead v. Holder*, No. 10-950 (GK), 2011 WL 611139, at *15–16 (D.D.C. Feb. 22, 2011); *Liberty Univ.*, 2010 WL 4860299, at *14–15.

45. *Mead*, 2011 WL 611139, at *18–19; *Liberty Univ.*, 2010 WL 4860299, at *15; *Thomas More*, 720 F. Supp. 2d at 894.

46. *Liberty Univ.*, 2010 WL 4860299, at *15; *Mead*, 2011 WL 611139, at *15–16; *Thomas More*, 720 F. Supp. 2d at 893–94.

47. *Thomas More*, 720 F. Supp. 2d at 893; *Mead*, 2011 WL 611139, at *16–17; *Liberty Univ.*, 2010 WL 4860299, at *16.

occur absent the provision—“precisely the harms that Congress sought to address with the Act’s regulatory measures.”⁴⁸ Additionally, these courts held that the “penalty” under the minimum-coverage provision was a legitimate enforcement mechanism for Congress to employ in requiring applicable individuals to purchase minimum health-insurance coverage. Having found the provision to be within the scope of the Commerce Clause, two of these courts did not address the constitutionality of the penalty for noncompliance as a tax under the General Welfare Clause.⁴⁹ The third court did address this question, however, and concluded for the same reasons as the courts below that the General Welfare Clause was inapplicable to resolving the penalty’s constitutionality.⁵⁰

In the second line of decision, the issue was the same, but the analytical framework, and therefore the result, was different. The courts here emphasized that even under the Supreme Court’s most expansive Commerce Clause jurisprudence, the Court required “some form of action, transaction, or deed placed in motion by an individual or legal entity.”⁵¹ A constitutional application of the Commerce Clause power, in other words, must involve “activity.”⁵² Disagreeing with the decisions above, these courts rejected the notion that because every individual inevitably will require medical treatment, “the conduct of the uninsured—their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay— . . . is economic activity.”⁵³ According to these courts, this interpretation of activity was “expansive” and defied “logical limitation.”⁵⁴ Having determined that “an individual’s personal decision to purchase—or decline to purchase—health insurance is beyond the historical reach of the Commerce Clause,” these courts also held that the Necessary and Proper Clause,⁵⁵ which acts as supplementary power to Congress’s enumerated powers, did “not provide a safe sanctuary” for

48. *Liberty Univ.*, 2010 WL 4860299, at *16; *Mead*, 2011 WL 611139, at *17; *Thomas More*, 720 F. Supp. 2d at 894–95.

49. See *Liberty Univ.*, 2010 WL 4860299, at *11; *Thomas More*, 720 F. Supp. 2d at 895.

50. See *Mead*, 2011 WL 611139, at *22–23.

51. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010); *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *21–23 (N.D. Fla. Jan. 31, 2011).

52. *Bondi*, 2011 WL 285683, at *21–23; *Cuccinelli*, 728 F. Supp. 2d at 781.

53. *Cuccinelli*, 728 F. Supp. 2d at 776 (citation omitted) (internal quotation marks omitted); *Bondi*, 2011 WL 285683, at *23–29.

54. *Cuccinelli*, 728 F. Supp. 2d at 781; *Bondi*, 2011 WL 285683, at *24–29.

55. U.S. CONST. art. I, § 8, cl. 18.

the minimum-coverage provision.⁵⁶

These courts' Commerce Clause analysis blended with their General Welfare Clause analysis. In assessing whether the "penalty" under the minimum-coverage provision was actually a "tax" that Congress could levy to spend on the general welfare, the courts dissected the legislative history and made similar observations: Congress (1) "specifically changed the term in previous incarnations of the statute from 'tax' to 'penalty'"; (2) "used the term 'tax' in describing the several other exactions provided for in the Act"; (3) "specifically relied on and identified its Commerce Clause power and not its taxing power"; (4) "eliminated traditional IRS enforcement methods for the failure to pay the 'tax'"; and (5) "failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seven other revenue-generating provisions were specifically so identified."⁵⁷ These factors led the courts to determine that the penalty was not a "bona fide revenue raising measure enacted under the taxing power of Congress," and thus only some other Article I power could sustain it.⁵⁸ The text of the provision was "clear[, however] . . . that the underlying regulatory scheme was conceived as an exercise of Commerce Clause powers"⁵⁹—an exercise that these courts held was invalid. Having thereby resolved that Congress had overstepped its constitutional bounds, these courts declared that the minimum-coverage provision was unconstitutional.⁶⁰

III. THE STAKES IN *FLORIDA EX REL. BONDI*

A. *The Dismissal Opinion*

Cognizant of the high-profile nature of the case before him,⁶¹ Senior District Judge Roger Vinson of the Pensacola Division of the Northern District of Florida commenced his first major opinion in *Bondi* with an explanation of "what this case is, and is not, about."⁶² Noting the "controversial and polarizing" nature of the Patient Protection and Affordable Care Act, the judge stated that it was not his "task or duty to

56. *Cuccinelli*, 728 F. Supp. 2d at 782; *Bondi*, 2011 WL 285683, at *29–33.

57. *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1140 (N.D. Fla. 2010); *Cuccinelli*, 728 F. Supp. 2d at 786–87; *see also* *Mead v. Holder*, No. 10-950 (GK), 2011 WL 611139, at *22–23 (D.D.C. Feb. 22, 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, No. 1:10-CV-763, 2011 WL 223010, at *9–12 (M.D. Pa. Jan. 24, 2011).

58. *Cuccinelli*, 728 F. Supp. 2d at 787–88; *McCollum*, 716 F. Supp. 2d at 1143–44.

59. *Cuccinelli*, 728 F. Supp. 2d at 788; *McCollum*, 716 F. Supp. 2d at 1136.

60. *Cuccinelli*, 728 F. Supp. 2d at 788; *Bondi*, 2011 WL 285683, at *33.

61. *See* Keith Laing, *Health Care Judge Vinson No Stranger to Big Cases*, SUNSHINE ST. NEWS (Sept. 14, 2010, 4:05 AM), <http://www.sunshinestateneews.com/story/health-care-judge-vinson-no-stranger-big-cases>.

62. *McCollum*, 716 F. Supp. 2d at 1127.

wade into the thicket of conflicting opinion” on the wisdom of the law.⁶³ His responsibility was to determine the Act’s constitutionality. And at the motion-to-dismiss stage, his job was merely to decide whether the court had jurisdiction over some of the claims before it and whether each count in the amended complaint stated a plausible claim for relief.⁶⁴

The defendants—the U.S. Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their respective secretaries—sought to dismiss several claims regarding the minimum-coverage provision on the ground that under Federal Rule of Civil Procedure 12(b)(1),⁶⁵ the court was without jurisdiction to adjudicate them. More precisely, the defendants argued, the plaintiffs lacked standing to challenge the provision, and their allegations were unripe. Alternatively, if the court construed the “penalty” under the individual minimum-coverage provision as a “tax,” the Anti-Injunction Act, which bars “suit for the purpose of restraining the assessment or collection of any tax,”⁶⁶ compelled dismissal.⁶⁷ Further, pursuant to Rule 12(b)(6),⁶⁸ the defendants sought to dismiss all six counts of the plaintiffs’ amended complaint for failure to state a claim upon which relief can be granted.⁶⁹

As the court explained in its Rule 12(b)(1) discussion, standing is a threshold barrier under Article III, which limits the jurisdiction of federal courts to “cases” and “controversies.”⁷⁰ The “irreducible constitutional minimum” of this strand of justiciability are “(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.”⁷¹ Injury-in-fact was the sole disputed element.

The court evaluated only whether two citizen plaintiffs (and, by extension, the plaintiff trade association, the National Federation of Independent Business (NFIB)) had standing to challenge the minimum-coverage provision. Added by the States to the amended complaint, both citizens were uninsured individuals who were ineligible for Medicaid or Medicare. One of them, a small business owner, was a member of the NFIB, which the States also adjoined to the amended complaint. As a businesswoman, this plaintiff claimed that the minimum-coverage provi-

63. *Id.* at 1127–28.

64. *Id.* at 1128.

65. FED. R. CIV. P. 12(b)(1).

66. 26 U.S.C. § 7421(a) (2006).

67. *McCollum*, 716 F. Supp. 2d at 1130.

68. FED. R. CIV. P. 12(b)(6).

69. *McCollum*, 716 F. Supp. 2d at 1130.

70. *Id.* at 1144.

71. *Id.* (internal quotation marks omitted) (quoting *Granite State Outdoor Adver., Inc. v. City of Clearwater*, Fla., 351 F.3d 1112, 1116 (11th Cir. 2003)).

sion would force her and other NFIB members, against their wants, “to divert resources from their business endeavors” and “reorder their economic circumstances” to obtain qualifying coverage.⁷² By contrast, the other citizen claimed that the provision compelled him to purchase health insurance that he did not need as a financially self-sufficient individual. In standing parlance, the citizens complained of injury insofar as the “individual mandate will force them to spend their money to buy something they do not want or need (or be penalized).”⁷³

The court disposed of several of the federal government’s objections that the citizens did not have standing. First, the court rejected the argument that the citizens’ injury was temporally too far off, countering that imposition of the minimum-coverage provision and penalty was “definitively fixed in time and impending” and that absent court action, the federal government would begin enforcing it in 2014.⁷⁴ Next, the court suggested that the government’s assertion that too much uncertainty surrounded the plaintiffs’ allegations was an attempt to “conjure up hypothetical events”⁷⁵ On this point, the court clarified that the citizens’ injury was not strictly the “economic burden” of having to acquire health insurance before 2014: The citizens did “not want to be forced to spend their money (whether they have a little or a lot) on something they do not want (or feel that they need), and, in this respect, they object to the individual mandate as ‘unconstitutional overreaching.’”⁷⁶ In sum, the court was satisfied that the citizens “establish[ed] a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement that is reasonably pegged to a sufficiently fixed period of time and which is not merely hypothetical or conjectural.”⁷⁷ Therefore, they had standing to challenge the minimum-coverage provision.⁷⁸

The court rejected the defendants’ other jurisdictional arguments as well. For essentially the same reasons that it held that the citizens had standing to attack the minimum-coverage provision binding on individuals, the court held that the State plaintiffs had standing to attack, as a violation of their sovereignty, a complementary provision in the PPACA that requires them and other large employers to insure their employees at

72. *Id.* at 1145 (citation omitted) (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 1146.

75. *Id.* at 1147.

76. *Id.* (citation omitted).

77. *Id.* (citations omitted) (internal quotation marks omitted).

78. Because the citizens had standing, the court held that the association, one of whose members was the businesswoman plaintiff, also had standing. *Id.* at 1148.

a prescribed minimum level.⁷⁹ On the question of whether the challenges to the minimum-coverage provisions applicable to individuals and employers were ripe, the court emphasized the certain, impending nature of their imposition and enforcement—factors that worked against the court postponing adjudication.⁸⁰ Well before 2014, moreover, individuals, businesses, and states would have to take steps to meet their statutory obligations.⁸¹ Finally, the court spent great length explaining that the exaction under the minimum-coverage provision was not a “tax.” The Anti-Injunction Act thus did not strip the court of jurisdiction.⁸²

Turning to the federal government’s arguments that the plaintiffs failed to state claims upon which relief can be granted under Rule 12(b)(6), the court remarked that it would have to examine each claim and “take a peek” at the relevant constitutional law.⁸³ In taking such a “peek,” the court dismissed four of the plaintiffs’ six claims. First, the court rejected the argument that the minimum-coverage provision applicable to the States disturbed their sovereignty as employers and in performance of their governmental functions. The court reasoned that the provision was a law of general applicability on public and private employers alike and that its allegedly adverse impact on the States’ treasuries was not an imposition on state sovereignty and state functions.⁸⁴ Second, the court found that the PPACA would not breach the States’

79. *Id.* at 1147–48 (“[T]o wit, the state plaintiffs have established a realistic (and not hypothetical or conjectural) danger of sustaining a redressable injury at a sufficiently fixed point in time as a result of the Act’s operation or enforcement.”).

80. *Id.* at 1149. The court noted the “conspicuous overlap” between standing and ripeness. *Id.* at 1148–49 (internal quotation marks omitted) (quoting *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006)). This overlap is evident in the court’s opinion. *Compare id.* at 1145 (citation omitted) (stating in its standing analysis that “[i]mposition of the individual mandate and penalty . . . is definitively fixed in time and impending” and that “absent action by this court, starting in 2014, the federal government will begin enforcing it”), *with id.* at 1149 (stating in its ripeness analysis that “[t]he complained of injury in this case is ‘certainly impending’ as there is no reason whatsoever to doubt that the federal government will enforce the individual mandate and employer mandate against the plaintiffs”).

81. *Id.* at 1149–50.

82. *Id.* at 1130–44. The court’s analysis here was a mix of substance and procedure. In the court’s words,

whether the individual mandate penalty is a tax is an important question that not only implicates jurisdiction (*vis-à-vis* the Anti-Injunction Act), and is not only the specific basis of one of the plaintiff’s causes of action, but it also goes to the merits of the individual mandate-related challenges . . . (that is, whether the penalty can be justified by, and enforced through, Congress’s indisputably broad taxing power), or whether, instead, the penalty must pass Constitutional muster, if at all, under the more limited Commerce Clause authority.

Id. at 1131.

83. *Id.* at 1151 (internal citations omitted).

84. *Id.* at 1151–54. *See generally* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Maryland v. Wirtz*, 392 U.S. 183 (1968).

sovereign police powers by "coercing and commandeering" them to set up exchanges in which consumers may compare and shop for health-insurance plans.⁸⁵ Quite oppositely, the court held, the States had a voluntary choice under the statute whether to construct and regulate the exchanges or to allow the federal government to do so.⁸⁶

Of the plaintiffs' three claims challenging the minimum-coverage provision applicable to individuals, the court dismissed two of them. Having already resolved that the penalty for noncompliance was not a tax, the court held that the claim that it was an unconstitutional capitation or direct tax was moot.⁸⁷ The court also held that the provision did not implicate any constitutional rights that the Supreme Court regards as fundamental under the substantive due-process component of the Fifth Amendment. Applying a deferential standard of review, the court ruled that Congress had a rational basis to conclude that the minimum-coverage provision was "essential" to the PPACA's insurance market reforms.⁸⁸

In refusing to dismiss the last of these three counts—the claim that the minimum-coverage provision exceeded the Commerce Clause—the court used language that suggests that it took more than just a "peek" at the law, particularly when juxtaposed with the language in its subsequent opinion. As in the other PPACA cases, the parties quarreled over whether the provision "seeks to impermissibly regulate economic *inactivity*" or "merely tells [individuals] *how* they must pay for a service they will almost certainly consume in the future."⁸⁹ The court declared that "[a]t this stage in the litigation, [dismissal] is not even a close call."⁹⁰ Even the Supreme Court's broadest Commerce Clause jurisprudence was "very different" from the case at bar and could not support the federal government's theory.⁹¹ According to the court, the plaintiffs in all the Supreme Court's precedents that upheld government action under the Commerce Clause "were each involved in an *activity* (regardless of

85. *McCollum*, 716 F. Supp. 2d at 1154.

86. *Id.* at 1154–55. *See generally* *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

87. *McCollum*, 716 F. Supp. 2d at 1160; *see* U.S. CONST. art. I, § 9, cl. 4. Nevertheless, the court, citing recent commentary, thought that "the argument is not only plausible, but appears to have *actual* merit . . ." (emphasis added).

88. *McCollum*, 716 F. Supp. 2d at 1161–62. The court, however, was not entirely unsympathetic to this claim: "We all treasure the freedom to make our own life decisions, including what to buy with respect to medical services. Is that a 'fundamental right'? The Supreme Court has not indicated that it is—at least not yet." *Id.* at 1162.

89. *Id.* at 1162 (emphasis added in second parenthetical).

90. *Id.* at 1163.

91. *Id.* at 1164; *see also id.* 1163–64 (describing the defendants' arguments as "simply without prior precedent" and pertinent case law as "differ[ing] markedly" in "several obvious ways").

whether it could readily be deemed interstate commerce) and each had a choice to discontinue that activity.”⁹² But those subject to the penalty under the minimum-coverage provision make “no choice” in deciding not to obtain health insurance; they are penalized “solely on citizenship and on being alive.”⁹³

The court further refused to dismiss the “coercing and commandeering” claim of the States as directed toward the PPACA’s Medicaid expansion, though expressing substantial skepticism of its likelihood of success. The cash-strapped States complained that they faced a “Hobson’s Choice”: either comply with the unprecedented overhaul of the Medicaid system’s regulatory and financial requirements or opt out of the system and confront the devastating consequences of losing federal matching funds.⁹⁴ Although Medicaid is formally a voluntary federal–state scheme and thus seemingly clearly within the Spending Clause, the States sought refuge in the Supreme Court’s speculation in *South Dakota v. Dole*⁹⁵ that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁹⁶ The court doubted that this “coercion theory” amounted to much, pointing to the pervasive hostility with which various appellate courts have treated it.⁹⁷ Because, however, the Eleventh Circuit had not spoken explicitly on this facet of *Dole*, and because the Supreme Court must have “meant what it said” there, the court concluded that the plaintiffs’ claim, threadbare though it may be, warranted factual development at later proceedings.⁹⁸

B. *The Summary Judgment Opinion*

In its highly anticipated opinion on the merits, the *Bondi* court responded to a lingering jurisdictional question that the parties debated in their memoranda submissions to the court on motion to dismiss: whether the States themselves had standing to challenge, as beyond the Commerce Clause, the minimum-coverage provision binding on individuals.⁹⁹ Although the court did not have to resolve this question—having found that the citizen and association plaintiffs had standing—the court

92. *Id.* at 1164.

93. *Id.*

94. *Id.* at 1156–57.

95. 483 U.S. 203 (1987).

96. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

97. *McCollum*, 716 F. Supp. 2d at 1158; *see, e.g.*, *Doe v. Nebraska*, 345 F.3d 593, 599 (8th Cir. 2003) (citation omitted) (“[W]e have found no coercion where a . . . large amount of federal money was at stake. Other circuits are in accord with this view.”).

98. *McCollum*, 716 F. Supp. 2d at 1160.

99. *Compare* Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 8–10, *McCollum*, 716 F. Supp. 2d 1120 (No. 3:10-cv-00091-RV-EMT), 2010 WL 3163990 at

answered affirmatively. Among the grounds that the States raised for standing, the court noted that some of the State plaintiffs had passed declaratory laws that seek “to protect their citizens from forced compliance with the individual mandate.”¹⁰⁰ The court looked to the only other case to confront state standing in this respect, *Virginia ex rel. Cuccinelli v. Sebelius*,¹⁰¹ and agreed with the court’s analysis there that despite the declaratory nature of Virginia’s “anti-mandate” statute, “the Commonwealth had adequate standing to bring the suit insofar as ‘[t]he mere existence of the lawfully-enacted statute [sic] is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.’”¹⁰² By comparison, at least two States in *Bondi* had “standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors.”¹⁰³

After thus expanding its standing analysis to cover two citizens, a trade association, and at least two States, the court finally turned to “the crux of this entire case”: whether the Commerce Clause could uphold the minimum-coverage provision.¹⁰⁴ The court engaged in a lengthy exposition on this source of congressional power before repeating from its dismissal opinion that “‘activity’ is an indispensable part [sic] the Commerce Clause analysis” and therefore the constitutionality of the minimum-coverage provision turned on whether the “failure to buy health insurance is ‘activity.’”¹⁰⁵ In the court’s view, such failure was not activity, contrary to two central arguments by the federal government: (1) that “people without health insurance are actively engaged in interstate commerce based on the purported ‘unique’ features of the much broader health care market”; and (2) that “the uninsured have made the calculated decision to engage in market timing and try to finance their future medical needs out-of-pocket rather than through insurance, and that this ‘economic decision’ is tantamount to activity.”¹⁰⁶ The court expressed a persistent concern throughout this discus-

*13–17, with Memorandum in Support of Defendants’ Motion to Dismiss at 29–31, *McCollum*, 716 F. Supp. 2d 1120 (No. 3:10-cv-00091-RV-EMT), 2010 WL 2663348 at *28–30.

100. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *9 (N.D. Fla. Jan. 31, 2011). See generally Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=18906> (last updated Jan. 5, 2011).

101. 702 F. Supp. 2d 598 (E.D. Va. 2010).

102. *Bondi*, 2011 WL 285683, at *9 (first alteration in original) (quoting *Cuccinelli*, 702 F. Supp. 2d at 605–07).

103. *Id.* (footnote omitted).

104. *Id.* at *10.

105. *Id.* at *23.

106. *Id.* at *27.

sion about the inability to construct a limiting principle to the defendants' theory of the Commerce Clause. Finishing its analysis, the court held that Congress could not employ the Necessary and Proper Clause to justify the minimum-coverage provision. Otherwise, Congress's authority to resort to "necessary and proper" means to actualize the enumerated ends in Article I would exceed the very scope of those ends.¹⁰⁷ The court thus granted summary judgment in the plaintiffs' favor.

The court spent comparably little length dispensing with the States' Medicaid "coercing and commandeering" claim. In the first place, resolving competing factual arguments over whether the Patient Protection and Affordable Care Act's Medicaid overhaul would bankrupt the States or save them money was "simply impossible" for the court.¹⁰⁸ The court agreed with case law that legally, moreover, state participation in Medicaid is voluntary, and the "coercion theory" from *South Dakota v. Dole* is an unworkable judicial standard to measure Congress's spending power.¹⁰⁹ The court accordingly granted summary judgment for the defendants.¹¹⁰

Practically speaking, however, the federal government did not "win" on this count. Going further than the *Cuccinelli* court in invalidating the minimum-coverage provision, the *Bondi* court ruled that none of the hundreds of provisions in the PPACA could stand, as the unconstitutional minimum-coverage provision was not severable from the larger Act.¹¹¹ Assuring that its declaratory judgment regarding the constitutionality of the provision was "the functional equivalent of an injunction," the court declined to grant the plaintiffs' request for enjoining the Act.¹¹² "This has been a difficult decision to reach," Judge Vinson said in closing, "and I am aware that it will have indeterminable implications."¹¹³ Whatever the implications, their future resolution now awaits the Eleventh Circuit.

107. *Id.* at *29–33.

108. *Id.* at *4.

109. *Id.* at *4–5.

110. *Id.* at *7.

111. Compare *id.* at *33–39 (holding that the minimum-coverage provision was not severable), with *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010) (holding that the minimum-coverage provision was severable).

112. *Bondi*, 2011 WL 285683, at *39.

113. *Id.* at *40.

IV. PLAINTIFF STANDING IN *FLORIDA EX REL. BONDI* AND THE
CHALLENGES TO THE PATIENT PROTECTION AND
AFFORDABLE CARE ACT

Given the pace with which the judiciary has rendered highly publicized, merit-based decisions on the constitutionality of the minimum-coverage provision, the potentially dispositive procedural issues at stake have been, unsurprisingly, overshadowed. Among these issues—namely standing, ripeness, and the applicability of the Anti-Injunction Act—standing is “perhaps the most important”¹¹⁴ The Ninth Circuit aptly characterized ripeness as “standing on a timeline” because it temporally evaluates the injury-in-fact element of standing.¹¹⁵ And, as the *Bondi* court explained, the Anti-Injunction Act, at least as applied to the minimum-coverage provision, is not strictly procedural.¹¹⁶

One of the requisites of a constitutional “case” or “controversy” in federal court, standing is generally understood as a party-focused doctrine that is “employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination.”¹¹⁷ A party cannot waive standing, nor can a court simply concede that standing exists.¹¹⁸ Only one party, however, needs standing to pursue a claim.¹¹⁹ On appeal, a reviewing court has an independent obligation,¹²⁰ using a de novo standard of review,¹²¹ to ensure that a party has standing as of the time that the complaint was filed. But an appellate court must defer, under a clear-error standard of review, to a lower

114. *Bischoff v. Osceola Cnty.*, Fla., 222 F.3d 874, 877–88 (11th Cir. 2000) (citations omitted) (internal quotation marks omitted) (describing standing as “perhaps the most important” jurisdictional doctrine under Article III).

115. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000); see also *Bryant v. Holder*, No. 2:10-CV-76-KS-MTP, 2011 WL 710693, at *1 n.1 (S.D. Miss. Feb. 2, 2011) (“[T]he Court is of the opinion that the standing and ripeness issues concern, in pertinent part, the same issue: whether Plaintiffs’ alleged injuries are sufficiently certain. Therefore, the Court’s ripeness analysis would be substantially redundant of its standing analysis. As the standing issue is dispositive at this juncture, the Court left Defendants’ ripeness argument unaddressed.”); *supra* note 80 (discussing the overlap between standing and ripeness).

116. See *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1131 (N.D. Fla. 2010).

117. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531 (3d ed. 1998).

118. See, e.g., *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 606–07 & n.24 (11th Cir. 1985); cf. *Brief for Appellees, Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir. filed Jan. 14, 2011) (failing to contest plaintiff standing to challenge the minimum-coverage provision after disputing plaintiff standing at the district-court level).

119. See, e.g., *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 n.10 (11th Cir. 2004).

120. See, e.g., *Arnold v. Martin*, 449 F.3d 1338, 1341 (11th Cir. 2006).

121. See, e.g., *McKusick v. City of Melbourne, Fla.*, 96 F.3d 478, 482 (11th Cir. 1996).

court's factual findings bearing on the elements of standing.¹²² These principles establish that when *Bondi* arrives at the Eleventh Circuit, the court must reassess whether any of the plaintiffs—the citizens, trade association,¹²³ or States—has standing to challenge the minimum-coverage provision of the Patient Protection and Affordable Care Act.

A. *Citizen Standing to Challenge the Minimum-Coverage Provision: Discerning the Injury-in-Fact*

Every PPACA case to date has addressed standing. The courts that reached the merits of the constitutional challenges to the minimum-coverage provision necessarily resolved initially that at least one of the plaintiffs, usually a citizen or organizational entity, had standing to contest the provision. Contrastingly, other courts dismissed whole PPACA suits on standing grounds.¹²⁴ Both the cases that recognized standing and those that did not are generally divisible with respect to the sufficient injury-in-fact that they found (or failed to find): a present injury or a future injury arising from the minimum-coverage provision. The predominant approach appears to be that a present injury will suffice for standing in this context; because *Bondi* seemingly based its decision on a determination of future injury, it is not entirely in accord—and indeed at points is in conflict—with the present-injury framework.

1. THE SEARCH FOR PRESENT INJURY

Two of the three cases as of this writing that sustained the minimum-coverage provision exemplify the course that several courts took in scrutinizing an alleged present injury. In both cases, *Thomas More*

122. See, e.g., *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975–77 (11th Cir. 2005).

123. The standing of the trade association turns on the citizen–association member having standing. Accordingly, analysis of the citizens' standing subsumes analysis of the association's standing. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *9 (N.D. Fla. Jan. 31, 2011) ("Because the individual plaintiffs have demonstrated standing, including NFIB member Mary Brown, that means . . . that NFIB has associational standing."); *N.J. Physicians, Inc. v. Obama*, No. 10-1489 (SDW)(MCA), 2010 WL 5060597, at *8 (D.N.J. Dec. 8, 2010) (footnote omitted) ("Here, [an association of physicians] . . . has standing only if its individual members do. Dr. Criscito is the only [association] member mentioned in the complaint. However, . . . Dr. Criscito does not have standing to challenge the Act. Consequently, [the association] cannot proceed."), *appeal filed*, No. 11-4600 (3d Cir. Jan. 26, 2011).

124. See *Kinder v. Geithner*, No. 1:10 CV 101 RWS, 2011 WL 1576721 (E.D. Mo. Apr. 26, 2011); *Purpura v. Sebellius*, No. 3:10-cv-04814-FLW-DEA, 2011 WL1547768 (D.N.J. Apr. 21, 2011); *Peterson v. United States*, No. 10-cv-170-JL, 2011 WL 1207222 (D.N.H. Mar. 30, 2011); *Bryant v. Holder*, No. 2:10-CV-76-KS-MTP, 2011 WL 710693 (S.D. Miss. Feb. 2, 2011); *N.J. Physicians*, 2010 WL 5060597; *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177 (E.D. Tenn. Nov. 4, 2010); *Baldwin v. Sebelius*, No. 10CV1033 DMS(WMC), 2010 WL 3418436 (S.D. Cal.), *cert. denied before judgment*, 131 S. Ct. 573 (2010).

*Law Center v. Obama*¹²⁵ and *Liberty University, Inc. v. Geithner*,¹²⁶ the plaintiffs were a coalition of organizational entities (a public-interest law firm and a university, respectively) and various individual citizens, including citizens without health insurance. The citizen plaintiffs in both cases alleged essentially the same injury: In *Thomas More*, the plaintiffs “describe[ed] their injury as being subjected to an unconstitutional regulation causing present economic injury and forcing a change in behavior with a significant possibility of future harm.”¹²⁷ Similarly, in *Liberty University*, the citizen plaintiffs argued that “before the individual coverage requirement takes effect in 2014, they will have to make ‘significant and costly changes’ in their personal financial planning, necessitating ‘significant lifestyle . . . changes’ and extensive reorganization of their personal and financial affairs.”¹²⁸ The courts concluded that the citizens’ present injury in having to “reorganize their affairs” under considerable financial strain was enough for standing.¹²⁹ As the *Thomas More* court reasoned,

the government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014. . . . There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today.¹³⁰

Notwithstanding their outcomes, a number of cases that dismissed attacks on the minimum-coverage provision for lack of standing are consistent with *Thomas More* and *Liberty University*. In *New Jersey Physicians, Inc. v. Obama*,¹³¹ for example, a citizen plaintiff who sought to challenge the provision alleged that he had standing because he was presently uninsured and did not plan to attain insurance in the future. In holding that the plaintiff did not have standing, the court noted that, unlike the citizen plaintiffs in *Thomas More*, he had not alleged that he was “being compelled to reorganize [his] affairs and that the need to purchase insurance was causing [him] to feel economic pressure

125. 720 F. Supp. 2d 882 (E.D. Mich. 2010).

126. No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010).

127. *Thomas More*, 720 F. Supp. 2d at 888.

128. *Liberty Univ.*, 2010 WL 4860299, at *5 (footnote omitted) (citation omitted). The uninsured citizen plaintiffs made this claim. Other citizen plaintiffs included a state legislator, city councilman, and medical doctor, all of whom the court found lacked standing. *Id.* at *4 nn.6–7.

129. *Thomas More*, 720 F. Supp. 2d at 888 (internal quotation marks omitted); *Liberty Univ.*, 2010 WL 4860299, at *5–7; see also *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, No. 1:10-CV-763, 2011 WL 223010, at *6–7 (M.D. Pa. Jan. 24, 2011).

130. *Thomas More*, 720 F. Supp. 2d at 889.

131. No. 10-1489 (SDW)(MCA), 2010 WL 5060597 (D.N.J. Dec. 8, 2010).

today.”¹³² Likewise, the court in *Bryant v. Holder* stressed that “[i]mportantly, Plaintiffs do not allege that they are *presently* rearranging their finances or incurring any economic harm.”¹³³

The courts in several cases, moreover, offered comparable responses to two of the federal government’s frequent contentions about plaintiff standing: “that the plaintiffs’ alleged injuries are too remote temporally to confer standing” and “that the future injuries are too uncertain or speculative to confer standing.”¹³⁴ As to the first argument, the *Thomas More* court, for example, conceded that “[i]t is true that the minimum coverage provision does not become effective until 2014” and that it “thus neither imposes obligations on plaintiffs nor exacts revenue from them before that time.”¹³⁵ “Ultimately, [however,] the court did not address whether the plaintiffs’ alleged *future* injury was sufficient to confer standing, as it held that the plaintiffs had alleged a *present* injury.”¹³⁶

Some courts expressed receptiveness to the federal government’s second, interrelated argument about the uncertainty of future injury. Among the courts that dismissed challenges to the minimum-coverage provision on standing grounds, the court in *Baldwin v. Sebelius*,¹³⁷ for instance, observed that “even if [the citizen plaintiff] does not have insurance at this time, he may well satisfy the minimum coverage provision of the Act by 2014: he may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act.”¹³⁸ Acknowledging

132. *Id.* at *7 (citation omitted) (internal quotation marks omitted); *see also* *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177, at *4 (E.D. Tenn. Nov. 4, 2010) (alterations and internal quotation marks omitted) (“Plaintiffs do not allege they will be compelled by the federal government to purchase health care coverage; nor have the individual Plaintiffs claimed they have rearranged their personal affairs presently or changed their behaviors to account for a future economic harm.”).

133. *Bryant v. Holder*, No. 2:10-CV-76-KS-MTP, 2011 WL 710693, at *8 n.3 (S.D. Miss. Feb. 2, 2011).

134. *Id.* at *4.

135. *Thomas More*, 720 F. Supp. 2d at 888.

136. *Bryant*, 2011 WL 710693, at *5 (emphases added) (citing *Thomas More*, 720 F. Supp. 2d at 889).

137. No. 10CV1033 DMS(WMC), 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010).

138. *Id.* at *3; *N.J. Physicians, Inc. v. Obama*, No. 10-1489 (SDW)(MCA), 2010 WL 5060597, at *4 (D.N.J. Dec. 8, 2010); *Thomas More*, 720 F. Supp. 2d at 888; *cf.* *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, No. 1:10-CV-763, 2011 WL 223010, at *6 (M.D. Pa. Jan. 24, 2011); *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at *6–7 (W.D. Va. Nov. 30, 2010). *But see* *Bryant*, 2011 WL 710693, at *10 (adopting the Florida district court’s rationale in rejecting the argument that “within the next four years, Plaintiffs may find employment in which they receive health insurance as a benefit, qualify for Medicare or Medicaid, decide to purchase a health insurance policy, or qualify for one of the provision’s exemptions”).

these contingencies, the courts in *Thomas More* and *Liberty University* limited their holdings so that “[i]f something happens to change plaintiffs’ circumstances in the future, such as coverage by employer-provided insurance, the case may very well become moot.”¹³⁹

Another common thread in the case law is the allegation by plaintiffs that they “object ‘to being compelled by the federal government to purchase health care coverage.’”¹⁴⁰ Where the plaintiffs additionally alleged a present economic injury, the courts did not address this “compulsion” argument. But in *Baldwin*, where the court did not find such an injury, the court did address—and rejected—the plaintiffs’ argument that they “do not consent to being compelled to comply”¹⁴¹ with the minimum-coverage provision. The court replied that the plaintiffs “cannot manufacture standing by withholding their consent to the law.”¹⁴² “To the extent Plaintiffs seek relief because Congress’s and the President’s failure to pass constitutionally sound health care legislation undermines the rule of law,” the court stated, “Plaintiffs are simply airing generalized grievances that the Court is precluded from adjudicating.”¹⁴³

2. THE SEARCH FOR FUTURE INJURY

In its dismissal opinion, the *Bondi* court did not clearly delineate whether the citizen plaintiffs’ disputed injury was a present or future one, as so many of the other courts did. But the court’s framing of the governing standard—whether the plaintiffs established “a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement that is reasonably pegged to a sufficiently fixed period of time and which is not merely hypothetical or conjectural”¹⁴⁴—and its accompanying analysis suggest that its focus was largely on future injury arising from the imposition and enforcement of the minimum-coverage provision in 2014.

By contrast, the court in *Mead v. Holder*¹⁴⁵ explicitly concluded that the citizen plaintiffs there adequately alleged a “future injury fairly

139. *Thomas More*, 720 F. Supp. 2d at 889; *Liberty Univ.*, 2010 WL 4860299, at *7.

140. *Thomas More*, 720 F. Supp. 2d at 887.

141. *Baldwin*, 2010 WL 3418436, at *3 (internal quotation marks omitted).

142. *Id.*

143. *Id.* (citations omitted) (alterations and internal quotation marks omitted); see also *Liberty Univ.*, 2010 WL 4860299, at *4 n.7 (concluding that a physician plaintiff’s opposition to the PPACA on the ground that “he believes it will not provide quality care to more patients at lower cost . . . appears to raise mere policy disagreements with the Act” and that “[t]his litigation is not the proper forum to air those grievances”).

144. *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1147 (N.D. Fla. 2010) (citations omitted) (internal quotation marks omitted).

145. No. 10-950 (GK), 2011 WL 611139 (D.D.C. Feb. 22, 2011).

traceable to the enforcement of the ACA beginning in 2014, when they are forced to make annual shared responsibility payments”¹⁴⁶ Like the *Bondi* court, the *Mead* court noted that the penalty under the minimum-coverage provision was definitely fixed in 2014 and was a final governmental decision, and would be imposed and enforced by the federal government in 2014 unless the court intervened.¹⁴⁷ The court recognized that it could not be said “with absolute certainty” that the citizen plaintiffs would be subject to the requirements of the minimum-coverage provision in 2014. “All that [wa]s required,” however, was that the plaintiffs allege a “substantial probability” that they would be subject to such requirements.¹⁴⁸ Having found that the plaintiffs met this standard, the court “conclude[d] that they . . . demonstrated a concrete, particularized, and imminent future injury”: payment of a penalty for failure to comply with the minimum-coverage provision.¹⁴⁹

The challenge with the *Bondi* and *Mead* courts’ approach is that “[a]llegations of future injury will satisfy the requirement ‘only if [the plaintiff] is *immediately* in danger of sustaining some *direct* injury as the result of the challenged official conduct.’”¹⁵⁰ This is a considerably more stringent inquiry than searching for a present injury. Unsurprisingly, then, the present-injury approach has predominated. Indeed, considering that no one will be at direct risk of incurring the penalty under the minimum-coverage provision until 2014 at the earliest, the federal government appears to be correct that “the plaintiffs’ alleged injuries are ‘too remote temporally’ to confer standing.”¹⁵¹ The *Thomas More* court said as much in stating that “[i]t is true that the minimum coverage provision does not become effective until 2014 . . . [and] thus neither imposes obligations on plaintiffs nor exacts revenue from them before that time.”¹⁵²

But, as a general principle, “temporal remoteness is [only] one factor to consider in the broader inquiry of whether a plaintiff’s alleged injuries are sufficiently certain and/or imminent.”¹⁵³ In the context of the minimum-coverage provision, another factor is the certainty that, come 2014, the citizen plaintiffs will be uninsured and therefore susceptible to

146. *Id.* at *8.

147. *Id.* at *7.

148. *Id.* at *8.

149. *Id.*

150. *Baldwin v. Sebelius*, 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010) (alteration in original) (internal quotation marks omitted) (quoting *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002)).

151. *Bryant v. Holder*, No. 2:10-CV-76-KS-MTP, 2011 WL 710693, at *8 (S.D. Miss. Feb. 2, 2011) (footnote omitted).

152. *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 888 (E.D. Mich. 2010).

153. *Bryant*, 2011 WL 710693, at *10 (footnote omitted).

injury in the form of the provision's penalty. *Bondi*—creating a conflict with *Baldwin*, among other cases—expressly rejected the federal government's assertion that there is “too much ‘uncertainty’”¹⁵⁴ here to preclude a finding of sufficient injury-in-fact. According to the court, just as the citizen plaintiffs might become eligible for Medicare before 2014, for example, they might also “no longer be alive [by 2014], or may at that time fall within one of the ‘exempt’ categories. Such ‘vagaries’ of life are always present, in almost every case that involves a pre-enforcement challenge.”¹⁵⁵

For support that the federal government's logic would bar all pre-enforcement judicial review of a statute, the court relied singularly on the Supreme Court case *Pierce v. Society of Sisters*.¹⁵⁶ Two private schools there sought and obtained constitutional review of a compulsory public-education law, which would not take effect for two years. “[N]otwithstanding the universe of possibilities that could have occurred between the filing of the suit and the law going into effect years later,” *Bondi* pointed out, the Supreme Court ruled that it could entertain the challenge because the private schools' injury “was present and very real, not a mere possibility in the remote future”; furthermore, preventing such “impending injury by unlawful action is a well-recognized function of courts of equity.”¹⁵⁷ *Bondi*, however, did not consider that the law in *Pierce* imposed criminal penalties for failure to comply—a factor that strongly favors pre-enforcement challenge of a statute.¹⁵⁸ The minimum-coverage provision, however, prohibits criminal penalties and other sanctions for failure to procure health insurance, thus weakening the court's reliance on *Pierce*.¹⁵⁹

Furthermore, *Mead*'s analysis does not lend much support to *Bondi*. Although the *Mead* court, citing *Bondi*, agreed that the “vagaries of life” should not preclude pre-enforcement judicial review of a statute,¹⁶⁰ its analysis is punctuated with discussion that the *Bondi* court probably would deem hypothetical and superfluous. Consistent with the federal government's frequent contention that by 2014 a citizen “may take a job that offers health insurance, or qualify for Medicaid or Medicare, or . . .

154. *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1147 (N.D. Fla. 2010).

155. *Id.*

156. 268 U.S. 510 (1925).

157. *McCollum*, 716 F. Supp. 2d at 1147 (internal quotation marks omitted) (quoting *Pierce*, 268 U.S. at 536).

158. See *N.J. Physicians, Inc. v. Obama*, No. 10-1489 (SDW)(MCA), 2010 WL 5060597, at *5 (D.N.J. Dec. 8, 2010) (citing *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010)).

159. *Id.* (citation omitted).

160. *Mead v. Holder*, No. 10-950 (GK), 2011 WL 611139, at *6 (D.D.C. Feb. 22, 2011).

may choose to purchase health insurance,”¹⁶¹ the *Mead* court held that one citizen plaintiff, a sixty-two-year-old uninsured, lacked standing because there was no “substantial probability” that in 2014 she would not be covered by Medicare Part A, which would exempt her from the penalty under the minimum-coverage provision.¹⁶² More fundamentally, the court’s reason in the first place for engaging in inquiry over future injury is questionable; in contrast to the *Bondi* court, the *Mead* court additionally, explicitly held that the plaintiffs alleged “a present injury resulting from their needing to rearrange their finances now in anticipation of . . . mandatory payments” under the minimum-coverage provision.¹⁶³ This present injury alone would have been enough for the court to continue to the merits.

In this last regard, *Bondi* is distinct from all the other PPACA cases, including *Mead*, in their varying emphasis on the finding (or failure to find) a present economic burden. Responding to the federal government’s argument that the plaintiffs could not accurately predict that health insurance would be an economic burden because the PPACA’s cost reforms could spur them to buy insurance on their own, the *Bondi* court downplayed that an economic burden was integral to the citizen plaintiffs’ standing.¹⁶⁴ Indeed, it did “not appear to be the case” that the plaintiffs objected to the minimum-coverage provision “solely” on the grounds that it imposed an economic burden and that they did not have health insurance because they could not afford it.¹⁶⁵ Rather, the plaintiffs did “not want to be forced to spend their money (whether they have a little or a lot) on something they do not want (or feel that they need), and, in this respect, they object to the individual mandate as ‘unconstitutional overreaching.’”¹⁶⁶

The court’s sanctioning of this complaint of “constitutional overreaching” is troublesome because the determination “for philosophical reasons not to buy insurance” is akin to “the kind of ‘Psychic Injury’ that ordinarily would not confer standing.”¹⁶⁷ Or, in the words of *Bald-*

161. *Baldwin v. Sebelius*, No. 10CV1033 DMS(WMC), 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010).

162. *Mead*, 2011 WL 611139, at *6. The court explained that the federal government renders Medicare Part A coverage in tandem with Social Security benefits. Because the plaintiff alleged only that she would refuse to enroll in Medicare Part A, and not that she would forego her Social Security benefits, the court was unconvinced that there was a “substantial probability” that the plaintiff would reject her monthly Social Security checks and thus not be covered by Medicare Part A in 2014. *Id.*

163. *Id.* at *8.

164. *See, Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.* 716 F. Supp. 2d 1120, 1146 (N.D. Fla. 2010) (citation omitted) (internal quotation marks omitted).

165. *Id.*

166. *Id.*

167. Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at

win, this is little more than a “generalized grievance.”¹⁶⁸ As the Supreme Court and Eleventh Circuit have reiterated, however, “‘a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws . . . —does not state an Article III case or controversy.’”¹⁶⁹

The implications of a party having standing to allege a “generalized grievance” are vast. If “constitutional overreaching” meets the injury prong of standing, then conceivably any opponent of the PPACA could challenge it in federal court. This is an important consideration, given that the Supreme Court’s first review of the minimum coverage provision might be limited to its constitutionality under the Commerce Clause, leaving open (assuming that it passes muster) future opportunities to challenge it on alternative bases (for example, the First Amendment). Moreover, the limitations that the *Thomas More* and *Liberty University* courts placed on the injuries in those cases—that future circumstances could moot the plaintiffs’ challenge to the minimum-coverage provision¹⁷⁰—do not attach to injurious “constitutional overreaching.” Only a change of mind—over which an individual wields total control—can moot one’s grievance in this manner.

In sum, the Eleventh Circuit should reject *Bondi*’s rationale for citizen standing to the extent that it deviates from analyzing a present injury.¹⁷¹ By critically reviewing the lower court’s reasoning and searching for such an injury, the Eleventh Circuit would hold true to traditional standing principles, as other PPACA courts adhered to them. If, on the other hand, the court approved *Bondi*’s future-injury analysis, it would shield the plaintiffs’ alleged injury from becoming moot before 2014 and would invite premature challenges to controversial legislation that has a staggered future timetable but that does not bear directly on an individual before implementation—thus potentially undermining the democratic process. Skeptical appellate review is further necessary to

4–5, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (No. 3:10-cv-00091-RV/EMT), 2010 WL 4949245 at *9–10 (citation omitted).

168. *Baldwin v. Sebelius*, No. 10CV1033 DMS(WMC), 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010).

169. *Dillard v. Chilton Cnty. Comm’n*, 495 F.3d 1324, 1331 (11th Cir. 2007) (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 601 (2007)).

170. See *Liberty Univ., Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at *7 (W.D. Va. Nov. 30, 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 889 (E.D. Mich. 2010).

171. To be sure, fragments of the district court’s dismissal opinion suggest allegations of a present economic injury. See *McCollum*, 716 F. Supp. 2d at 1146, 1149–50 n.11. The court’s summary-judgment opinion, moreover, may have mitigated the shortcomings of its future-injury analysis by determining that the citizen plaintiffs “are needing to take investigatory steps and make financial arrangements now to ensure compliance” in 2014. *Bondi*, 2011 WL 285683, at *8.

expose the States' amendment of their complaint to include two random citizens as plaintiffs for what it really was: a strategic litigation move to "plug the standing gap"¹⁷² created by the State plaintiffs—the true adversaries, whose standing to challenge the minimum-coverage provision is "far less obvious"¹⁷³

B. *State Standing to Challenge the Minimum-Coverage Provision:
The Sovereignty of the Whole Versus the Sovereignty of
the Parts*

States have a unique role in the Article III standing analysis. To have standing in federal court, a state must assert an injury on one of several grounds. A state may claim an injury to a sovereign interest, such as its interest in "creat[ing] and enforce[ing] a legal code, both civil and criminal" to exercise sovereignty over individuals and entities within the state's jurisdiction.¹⁷⁴ Additionally, a state may claim an injury to a propriety interest in land or a business venture, for examples.¹⁷⁵

A state does not have standing to vindicate private individuals' rights.¹⁷⁶ Yet a state may have standing to bring suit as *parens patriae* (meaning "parent of the country") to protect its "quasi-sovereign" interests "in the health and well-being—both physical and economic—of its residents . . . [and] in not being discriminatorily denied its rightful status within the federal system."¹⁷⁷ An important limitation on *parens patriae* standing, as the Supreme Court articulated in *Massachusetts v. Mellon* (*Mellon*),¹⁷⁸ is that "a state, as *parens patriae*, may [not] institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."¹⁷⁹ The rationale for this limitation is grounded in federalism: "[I]t is no part of [a state's] duty or power to enforce [citizens'] rights in respect of their relations with the federal government. In

172. See Simon Lazarus & Alan Morrison, *Lawsuit Abuse, GOP Style*, SLATE (May 5, 2010, 9:35 AM), <http://www.slate.com/id/2252867/> ("[S]tate governments are the wrong plaintiffs to challenge the individual insurance mandate. . . . The attorneys general might have attempted to plug this gap by adding individual plaintiffs to their complaints.").

173. Ilya Somin, *Standing and Ripeness Issues in the Lawsuits Against Obamacare*, VOLOKH CONSPIRACY (Apr. 2, 2010, 2:15 AM), <http://volokh.com/2010/04/02/standing-and-ripeness-issues-in-the-lawsuits-against-obamacare/>; see also Farley, *supra* note 3, at 70–71.

174. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); cf. 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 101.60(4)(a) (3d ed. 1997) (footnote omitted) ("What constitutes a state's sovereign interests, however, is somewhat unclear.").

175. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601–02.

176. *Id.* at 602.

177. *Id.* at 607.

178. 262 U.S. 447 (1923).

179. *Id.* at 485; cf. *Chiles v. Thornburgh*, 865 F.2d 1197, 1208–09 (11th Cir. 1989) ("It is unclear how broadly this pronouncement is to be taken . . .").

that field it is the United States, and not the state, which represents them as *parens patriae*”¹⁸⁰

1. VIRGINIA EX REL. CUCCINELLI: DUBIOUS SUPPORT FOR STATE STANDING

Faced with resolving whether the States in *Bond* have standing to challenge the minimum-coverage provision, the Eleventh Circuit, much like the district court in its summary-judgment opinion, naturally might look to *Virginia ex rel. Cuccinelli v. Sebelius*,¹⁸¹ the only other case to deal with the issue. The federal government there relied on *Mellon* to argue on motion to dismiss that Virginia could not contest the constitutionality of the provision on behalf of its citizens as *parens patriae*.¹⁸² Moreover, the federal government claimed, a Virginia statute that declared, without any enforcement mechanism, that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage”¹⁸³ was an insufficient basis on which the Commonwealth could assert an injury to a sovereign interest.¹⁸⁴ The court, however, rejected the *Mellon* analogy and embraced Virginia’s argument that it was suing in its individual, or sovereign, interest insofar as it was “not simply representing individual citizens, [but wa]s defending the constitutionality of its duly enacted laws.”¹⁸⁵ Adopting the rationale of a Tenth Circuit case, *Wyoming ex rel. Crank v. United States*,¹⁸⁶ the court held that the preemptory effect of the federal minimum-coverage provision on the Virginia statute created a sufficient injury-in-fact to grant the Commonwealth, through its Attorney General, Article III standing.¹⁸⁷ Accordingly, Virginia could move forward with its substantive challenges.

180. *Mellon*, 262 U.S. at 485–86.

181. 702 F. Supp. 2d 598 (E.D. Va. 2010).

182. *Id.* at 602.

183. VA. CODE ANN. § 38.2-3430.1:1 (2010). *See generally* Farley, *supra* note 3, at 53–58 (discussing legislative efforts in Virginia to reject the minimum-coverage provision in the PPACA).

184. *Cuccinelli*, 702 F. Supp. 2d at 602.

185. *Id.* at 602–03. Oklahoma apparently hopes that this same argument will grant the State standing to sue in federal court there to challenge the minimum-coverage provision. With a new attorney general in office, the State announced that it would file an independent lawsuit to defend the “Oklahoma Health Care Freedom Amendment, which amended the state Constitution to say that Oklahomans cannot be forced to purchase insurance” Press Release, Okla. Office of the Att’y Gen., Oklahoma Attorney General-Elect Will File Lawsuit Against Federal Health Care Reform Bill (Jan. 7, 2011), <http://www.oag.state.ok.us/oagweb.nsf/0/8723EA10351AAEE08625781400654082?OpenDocument>; *see* Complaint for Declaratory & Injunctive Relief, Oklahoma *ex rel.* Pruitt v. Sebelius, No. 6:11-CV-30 (E.D. Okla. filed Jan. 21, 2011).

186. 539 F.3d 1236 (10th Cir. 2008).

187. *Cuccinelli*, 702 F. Supp. 2d at 606–07.

This analysis does not translate automatically to *Bondi*. Florida—the namesake of the lawsuit—notably does not have an “anti-mandate” law comparable to Virginia’s. In fact, the Florida Supreme Court ruled that a proposed 2010 state constitutional amendment, which aimed to “guard against mandates that don’t work,” was “misleading and ambiguous” in its ballot language and therefore could not appear on the ballot.¹⁸⁸ Of course, this is not the end of the matter because other State plaintiffs in *Bondi*, such as Idaho and Utah, have laws like Virginia’s, and only one of them needs standing to advance a challenge to the PPACA’s minimum-coverage provision.¹⁸⁹

Nonetheless, close scrutiny suggests that the *Cuccinelli* opinion is not cogent. Carrying broad consequences, the opinion implies that a law simply of a “declaratory nature,”¹⁹⁰ which “imposes no obligation”¹⁹¹ on a state, may be sufficient for standing where a federal law “preempts” the state law. To use the words of the *Cuccinelli* court in its subsequent Commerce Clause discussion, this defies “logical limitation.”¹⁹² Professor Joondeph’s criticism on this point warrants excerpting:

[I]f this proposition is true, then any state, in any circumstance, could enact a law stating something akin to “federal Public Law [fill in the blank] is inoperable in this state,” and thus have standing to sue the United States government in federal court to have the federal law declared unconstitutional. Indeed, the logic of Judge Hudson’s opinion would extend to administrative regulations as well, as those, too, are part of a state’s “legal code.” So presumably a state-level agency could promulgate a regulation stating that, say, it is inconsistent with state law for any government to regulate greenhouse gases, and the

188. Fla. Dep’t of State v. Mangat, 43 So. 3d 642, 651 (Fla. 2010) (per curiam).

189. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *9 (N.D. Fla. Jan. 31, 2011).

190. *Cuccinelli*, 702 F. Supp. 2d at 605. The declaration–enforcement distinction sets *Cuccinelli* apart from the case whose reasoning it adopted, *Wyoming ex rel. Crank v. United States*. The latter case involved a federal criminal law that prohibited a person convicted under state law of a misdemeanor of domestic violence from owning a firearm that had traveled in interstate commerce. *Crank*, 539 F.3d at 1239. The statute was inapplicable, however, to any misdemeanor conviction that had been expunged or set aside. *Id.* (citation omitted) (footnote omitted). The Wyoming Legislature enacted a law establishing a procedure to expunge misdemeanors of domestic violence. When the State clashed with the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives over what source of law—federal or state—governed the definition of “expunge” in the federal statute, the State had a cognizable interest for the purpose of standing in whether enforcing the procedure under its law would preclude imposition of the federal statute. By contrast, as the federal government argued on motion to dismiss in *Bondi*, the State plaintiffs’ “anti-mandate” statutes “have no function beyond expressing an opinion that federal law is invalid.” Reply in Support of Defendants’ Motion to Dismiss at 15 n.10, *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-00091-RV-EMT), 2010 WL 3500155 at *14.

191. *Cuccinelli*, 702 F. Supp. 2d at 602.

192. *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010).

existence of that regulation alone would give the state standing to challenge the federal government's regulation of private firms in that state.¹⁹³

Significantly, the *Cuccinelli* court attempted to immunize its standing decision by reasoning that the "purported transparent legislative intent underlying [the] enactment [of the Virginia statute] is irrelevant."¹⁹⁴ All that matters is that the statute "is a lawfully-enacted part of the laws of Virginia."¹⁹⁵ The goal of this and similar measures—to nullify federal law—is problematic, however, in that it is "constitutionally impossible"¹⁹⁶ to achieve under the Supremacy Clause¹⁹⁷ of the Constitution. American history is replete with anecdotes—perhaps the Civil War foremost among them—that establish this "impossibility." Thus, a state law that aspires only to reject the operability of a federal enactment within that state's territory "is not 'lawfully enacted' in a broader sense."¹⁹⁸ A contrary conclusion would be a backward step in the development of federalism in the United States and would encourage provocation between the federal and state governments, with potential adverse consequences in times of high antigovernment sentiment. Therefore, the Eleventh Circuit should reject *Cuccinelli* as support for the States to have standing to challenge the minimum-coverage provision in their own right.

2. *MASSACHUSETTS V. EPA*: "SPECIAL SOLICITUDE" IN CHALLENGING THE MINIMUM-COVERAGE PROVISION?

The alleged bases left for the States in *Bondi* to challenge the minimum-coverage provision—unexplored in *Bondi*—are equally, if not more, weak than the basis that the court in *Cuccinelli* recognized. On motion to dismiss, the States in *Bondi* asserted two alternative bases. For one, they argued, they had standing to attack the provision because Congress had "usurp[ed] Plaintiff States' sovereign power to enact statutes or State constitutional provisions to protect their State citizens from

193. Brad Joondeph, *More on Virginia's Standing (Or the Lack Thereof)*, ACA LITIG. BLOG (Aug. 9, 2010, 2:37 PM), <http://acalitigationblog.blogspot.com/2010/08/more-on-virginias-standing-or-lack.html>; see also Jack Balkin, *Judge Preserves Constitutional Challenge to Individual Mandate*, BALKINIZATION (Aug. 2, 2010, 12:25 PM), <http://balkin.blogspot.com/2010/08/judge-preserves-constitutional.html> ("In essence, Judge Hudson argues that by passing a law that says that Virginia will interpose itself to protect its citizens from the individual mandate, Virginia has succeeded both in giving itself standing and in getting around the federal tax-anti-injunction act. These arguments are the weakest part of the opinion . . .").

194. *Cuccinelli*, 702 F. Supp. 2d at 605.

195. *Id.*

196. Timothy S. Jost, *Can the States Nullify Health Care Reform?*, NEW ENG. J. MED., Feb. 10, 2010, <http://healthpolicyandreform.nejm.org/?p=2967>.

197. U.S. CONST. art. VI, cl. 2.

198. Joondeph, *supra* note 193; see also Jost, *supra* note 196.

compulsion in their healthcare choices.”¹⁹⁹ The Supreme Court, however, foreclosed the justiciability of this assertion almost a century ago in *Mellon*. There, it stated that it was without jurisdiction in cases where it was “called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.”²⁰⁰

In addition, the States claimed that they could challenge the minimum-coverage provision “because other portions of the Act—expanded Medicaid coverage and insurance requirements . . . —clearly will injure them, and the mandate cannot be severed from those provisions.”²⁰¹ This “bootstrap-through-a-lack-of-severability argument”²⁰² muddles the basic tenets of Article III standing. Whether the PPACA’s enlargement of Medicaid, a technically voluntary program for the States, will ultimately impose costs greater than the savings the States might realize is sharply disputed²⁰³—in other words, a matter of conjecture that does not rise to actual injury.²⁰⁴ Moreover, the States seemed to conflate the injury and redressability prongs of Article III standing. Although striking down the minimum-coverage provision might redress the supposedly injurious Medicaid provisions of the PPACA (assuming that the court must invalidate the latter because the former is unconstitutional and cannot be severed from the PPACA), the question over the injury that the minimum-coverage provision imposes on the States persists on its own.²⁰⁵

The States thus rest on shaky jurisdictional ground in attacking the minimum-coverage provision. Not to be overlooked, however, the Supreme Court’s most recent proclamation on state standing in *Massachusetts v. Environmental Protection Agency* (*Massachusetts*)²⁰⁶ debatably may create a wrinkle in this analysis. In that case, a coalition of States, intervening on behalf of various private organizations, challenged the Environmental Protection Agency’s (EPA) denial of a rulemaking

199. Plaintiffs Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 99, at 8, 2010 WL 3163990 at *16 (citation omitted).

200. *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923).

201. Plaintiffs Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 99, at 6–7, 2010 WL 3163990 at *15.

202. Brad Joondeph, *Standing Through Non-Severability?*, ACA LITIG. BLOG (Oct. 2, 2010, 1:44 PM), <http://acalitigationblog.blogspot.com/2010/10/standing-through-non-severability.html>.

203. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *4 (N.D. Fla. Jan. 31, 2011).

204. See Reply in Support of Defendants’ Motion to Dismiss, *supra* note 190, at 13, 2010 WL 3500155 at *13–14.

205. See Joondeph, *supra* note 202.

206. 549 U.S. 497 (2007).

petition that asked the Agency to regulate, pursuant to the Clean Air Act, greenhouse gas emissions from new automobiles.²⁰⁷ As a threshold matter, the Court had to decide whether the States had standing to seek review of the Agency's order.²⁰⁸

The Court used sweeping language to frame the issue. "States are not normal litigants for the purposes of invoking federal jurisdiction," the Court stated, "stress[ing]" the "special position and interest" of one of the State plaintiffs before the Court, Massachusetts.²⁰⁹ Quoting a case in which the Court held that Georgia had standing to protect its citizens from air pollution originating in Tennessee, the Court declared that a state suing as *parens patriae* "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."²¹⁰ The Court concluded that "Massachusetts' well-founded desire to preserve its sovereign territory today" from the ravaging effects of global warming supported federal jurisdiction, "[j]ust as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago"²¹¹ Moreover, in the present case Congress had enumerated a procedural right under the Clean Air Act to challenge the EPA's rejection of a rulemaking petition. "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."²¹²

The Court still had to determine whether Massachusetts actually had standing. Applying the three-part Article III test, the Court concluded first that rising sea levels associated with global warming had injured, and would continue to injure, the Commonwealth.²¹³ The EPA, furthermore, had at least "contributed" to Massachusetts's injuries by failing to regulate greenhouse gas emissions from new automobiles—leading causal agents of global warming.²¹⁴ Lastly, EPA regulatory action to some extent would redress the Commonwealth's injuries by slowing or reducing (although perhaps not preventing) the risk of real, though remote, catastrophic harm from global warming.²¹⁵ Therefore,

207. *Id.* at 510–14.

208. *Id.* at 516.

209. *Id.* at 518.

210. *Id.* at 518–19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

211. *Id.* at 519.

212. *Id.* at 520.

213. *Id.* at 521–23.

214. *Id.* at 523–24.

215. *Id.* at 525–26.

Massachusetts had standing to challenge the EPA's order.²¹⁶

In dissent, Chief Justice Roberts criticized the Court for "chang[ing] the rules" of Article III standing.²¹⁷ According to him, the notion that states have "special solicitude" for standing purposes "has no basis in our jurisprudence," and the majority was "conspicuously" short of authority to support such a notion.²¹⁸ The Chief Justice further accused the majority of "overlook[ing]" the rule from *Mellon* that a state generally cannot assert a quasi-sovereign interest against the federal government.²¹⁹ Turning to the "traditional terms" of standing—*injury-in-fact*, causation, and redressability—the Chief Justice concluded that Massachusetts did not pass the test.²²⁰ He lamented that the majority's relaxation of "Article III requirements has caused us to transgress 'the proper—and properly limited—role of the courts in a democratic society.'"²²¹

As to the state-initiated challenges to the PPACA's minimum-coverage provision, sources suggest a potentially expansive role for *Massachusetts v. Environmental Protection Agency*. The PPACA courts already have seized on *Massachusetts's* "special solicitude" language.²²² By footnote in its dismissal opinion, the court in *Cuccinelli* observed that states "are often accorded 'special solicitude' in standing analysis."²²³ And the court in *New Jersey Physicians, Inc. v. Obama* made this point specifically in relation to *Bondi*: "[I]n that case, there were sixteen states involved and as stated earlier, the Supreme Court has recognized that states are usually given 'special solicitude' in the standing analysis due to their need to protect their sovereign interests."²²⁴ Commentators, moreover, are unsure about the influence that the case could wield.²²⁵ Professor Somin, for example, suggested that *Massachusetts*

216. *Id.* at 526.

217. *Id.* at 536 (Roberts, C.J., dissenting).

218. *Id.*

219. *Id.* at 539.

220. *Id.* at 540.

221. *Id.* at 548–49 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

222. Cf. Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 19 (2007) (exploring the historical origin of the phrase "special solicitude" and hypothesizing that it "is likely to become shorthand for the new rule for standing this case creates (or at least clarifies)").

223. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 606 n.5 (E.D. Va. 2010) (citation omitted).

224. *N.J. Physicians, Inc. v. Obama*, No. 10-1489 (SDW)(MCA), 2010 WL 5060597, at *6 (D.N.J. Dec. 8, 2010) (citation omitted); *id.* at *5 (distinguishing *Massachusetts* as authority for an uninsured citizen to have standing to challenge the minimum-coverage provision).

225. See Farley, *supra* note 3, at 70–72; Linda Greenhouse, *Who Stands for Standing?*, OPINIONATOR (Sept. 23, 2010, 9:44 PM), <http://opinionator.blogs.nytimes.com/2010/09/23/who-stands-for-standing/>; Somin, *supra* note 173; Ilya Somin, *Are Right and Left Changing Where They Stand on Standing?*, VOLOKH CONSPIRACY (Aug. 18, 2010, 10:00 PM), <http://volokh.com/>

“ironically” could confer the State litigants with standing to challenge the provision—the irony being that “the EPA case was decided by the five most liberal justices—the ones least likely to be sympathetic to the Obamacare lawsuits, while the four most conservative justices dissented . . . and have more generally supported stringent standing rules.”²²⁶

Still, that the States have “special solicitude” to challenge the minimum-coverage provision is hardly certain. Important bases exist to differentiate *Massachusetts* in the PPACA setting. In response to Chief Justice Roberts’ allegations that the majority abandoned the *Mellon* rule, the Court assured that it did not: “[T]here is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).”²²⁷ The Court continued that “Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens”²²⁸—exactly what the States dispute with respect to the minimum-coverage provision. Further, the Court did not speak of states’ “special solicitude” in a vacuum; rather, it conveyed that Massachusetts had special solicitude to challenge the EPA’s denial of the rulemaking petition to the extent that the Commonwealth had a “procedural right [to challenge the denial] and [a] stake in protecting its quasi-sovereign interests”²²⁹ By contrast, the PPACA features no analogous procedural right. Additionally, the States in both *McCullum* and *Cuccinelli* expressly disavowed that they were suing as *parens patriae* to protect their “quasi-sovereign” interests,²³⁰ as Massachusetts was. The *Cuccinelli* court thus misread *Massachusetts* when it said that “[g]iven the stake states have in protecting their *sovereign* interests, they are often accorded ‘special solicitude’ in standing analysis.”²³¹

2010/08/18/are-right-and-left-changing-where-they-stand-on-standing/; cf. 13B WRIGHT, MILLER & COOPER, *supra* note 117, § 3531.11.1 (“Speculation about the balance among the Justices in future decisions [after *Massachusetts*] may be engaging, but is futile. . . . It remains to be seen how often even a narrow majority will be found to support state standing even in cases addressing administrative regulatory acts, much less more fundamental constitutional questions.”).

226. Somin, *supra* note 173; see also Greenhouse, *supra* note 225.

227. *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007).

228. *Id.*

229. *Id.* at 520.

230. *Cuccinelli*, 702 F. Supp. 2d at 603 (“The Commonwealth argues that it is not prosecuting this case in a *parens patriae*, or quasi-sovereign capacity.”); Plaintiffs Memorandum in Opposition to Defendants’ Motion to Dismiss, *supra* note 99, at 10 n.12, 2010 WL 3163990 at *17 n.12 (describing *Mellon* and *Massachusetts v. Environmental Protection Agency* as “inapposite” and “deal[ing] with States’ quasi-sovereign standing as *parens patriae*”).

231. *Cuccinelli*, 702 F. Supp. 2d at 606 n.5 (emphasis added) (citation omitted); see also *N.J. Physicians, Inc. v. Obama*, No. 10-1489 (SDW)(MCA), 2010 WL 5060597, at *6 (D.N.J. Dec. 8, 2010) (emphasis added) (citation omitted) (“[T]he Supreme Court has recognized that states are usually given ‘special solicitude’ in the standing analysis due to their need to protect their *sovereign* interests.”).

The Supreme Court's rulings in *Mellon*—and even in *Massachusetts v. Environmental Protection Agency*—do not afford the States any legal foundation to oppose the minimum-coverage provision. Therefore, the *Bondi* court erred in its dictum analysis in its summary judgment opinion that at least two State plaintiffs had standing to challenge the provision. Nevertheless, *Bondi* and the other state-led actions present reviewing courts, including the Eleventh Circuit, with an opportunity to clarify how broadly *Massachusetts* extends.

V. CONCLUSION

That someone will have standing to challenge the constitutionality of Congress's and the President's latest attempt at national health-care reform is perhaps a foregone conclusion. Nevertheless, the question of *who* that someone will be—and should be—remains. This question is important given the development of standing as “one of the hot legal topics of the coming months or even years”²³² and the intense politicization of the legal challenges to the Patient Protection and Affordable Care Act. The political dimensions are most apparent in the state-initiated lawsuits, which have pitted governors against attorneys general, attorneys general against governors, and citizens against citizens in ascertaining whether taxpayer-funded attacks on the legislation promote the “public interest.”²³³ The courts accordingly should probe carefully whether states in their official capacities have standing to mount these attacks in the first place.

A skeptical analysis suggests that, at most, the two citizen plaintiffs in *Florida ex rel. Bondi v. U.S. Department of Health & Human Services* have standing to dispute the minimum-coverage provision in the Act. Even so, *Bondi*'s foundation for recognizing these plaintiffs' standing is in tension with the sensible, limited standing jurisprudence that has emerged from cases such as *Thomas More Law Center v. Obama*, which concluded that a citizen's present economic injury in securing sufficient health insurance under the Act or facing the threat of a “penalty” in 2014 was all that Article III required. The State plaintiffs, however, fare much less successfully in the calculus, as the asserted injuries to “sovereign” interests recognized by *Cuccinelli* and *Bondi* lack support in case law, including *Massachusetts v. Environmental Protection Agency*.

232. Greenhouse, *supra* note 225.

233. See, e.g., Amicus Brief on Behalf of the Governors of Washington, Colorado, Michigan & Pennsylvania in Support of Defendants' Motion for Summary Judgment at 1, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011) (No. 3:10-cv-00091-RV/EMT), 2010 WL 4876892 at *4 (“Unlike the Attorneys General of their respective states who are plaintiffs in this action, the Governors believe that the Act is constitutional and consistent with the principles of dual sovereignty underlying our federal form of government.”).

In the closing remarks of his dismissal opinion, Judge Vinson touched on the concerns of federalism at the core of the PPACA cases. Quoting the Supreme Court, he underscored that the Constitution “divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”²³⁴ This concern is consistent with the normative overlays of this casenote. At least with regard to the state-led lawsuits against the PPACA’s minimum-coverage provision—an “individual mandate” whose burden ultimately falls on individuals, not states—a critical, dispositive standing analysis appreciates that states ordinarily “should not go about meddling in the enforcement of federal law as between individual citizens.”²³⁵ Such meddling divides the citizenry and requires the states to take a side, “even if the only result is to submit a question of federal law for resolution by a federal court.”²³⁶ Therefore, the final constitutional test over the minimum-coverage provision should rest with the citizens—the “people.” And with the multitude of PPACA lawsuits that have materialized across the United States, no shortage of authentic citizen-led opportunities exists. *Bondi*—a showcase of a group of States’ “institutional heft”²³⁷—is just not one of them.

234. Florida *ex rel.* McCollum v. U.S. Dep’t of Health & Human Servs., 716 F. Supp. 2d 1120, 1165 (N.D. Fla. 2010) (quoting New York v. United States, 505 U.S. 144, 187 (1992)).

235. 13B WRIGHT, MILLER & COOPER, *supra* note 117, § 3531.11.1.

236. *Id.*

237. Joondeph, *supra* note 19.